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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED *

1. Whether a "mountain view" ordinance, adopted by the Denver City Council at the behest of a group of local homeowners opposed to the proposed development plans of out-of-state landowners, and which destroys at least 60% of the value of the landowners' holdings under otherwise controlling city zoning regulations, escapes scrutiny under the "takings" clause of the Fifth and Fourteenth Amendments solely because it does not deprive the landowners of all value attached to their property.

2. Whether the Fifth and Fourteenth Amendments require a state court to enter a money judgment against a governmental entity when a regulatory measure adopted by that entity results in a "taking" of private property.

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* The following are subsidiaries of Harsh Investment Corporation: Claremont Hotel Corporation; Fountain Gallery of Art, Inc.; The Fountain Fine Arts, Inc.; Harsh Building Co.; King Tower, Inc.; MacArthur/Broadway, Inc.; Public Service Agency Co.; Regency Tower Corp.; Harsh Colorado Corp.

Harsh Investment Corporation is a general partner in Harsh Realty Co. and Clay Tower Apartments.

In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs*: Landmark Land Company, Inc.; Southmoor Park Shopping, Inc.

2. *Defendants:* The City Council of the City and County of Denver and its members, Cathy Reynolds, Robert Crider, William A. Scheitler, T.J. Hackworth, M.L. Sandos, Paul A. Hentzell, Paul L. Swalm, John J. Silchia, Edward F. Burke, Jr., King M. Trimble, Salvadore Carpio, Cathy Donohue, William R. Roberts; William H. McNichols, Mayor of the City and County of Denver; the Building Department of the City and County of Denver; Jack Tanigawa, Acting Director of the City and County of Denver.

3. *Defendants-Intervenors*: Southmoor Park East Homeowners Association, Inc.; Thomas P. McCallin.

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On Appeal from the Supreme Court, State of Colorado

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Colorado Supreme Court (App. A at 1a-14a), dated December 2, 1986, is reported at 728 P.2d 1281. The transcript of the state district court's decision, rendered August 15, 1984, is reproduced in App. B (at 15a-25a). The district court's order dismissing appellant's complaint (App. C at 26a) was entered August 28, 1984.

JURISDICTION

The decision of the Colorado Supreme Court was rendered December 2, 1986. Appellant's motion for rehearing was denied by an order of the Colorado Supreme Court entered December 22, 1986 (App. D at 27a-29a). The notice of appeal (App. E at 30a-33a) was filed with the clerk of the Colorado Supreme Court on March 2,

1987.[1] The Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTION AND STATUTES

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Fifth Amendment provides, in pertinent part:

> "[N]or shall private property be taken for public use, without just compensation."

Section 10-62.5 of the Revised Municipal Code of the City and County of Denver (hereafter cited as "Code") is reproduced in App. F (at 42a-44a).

STATEMENT OF THE CASE

If a state land-use regulation goes "too far," it constitutes a "taking" within the meaning of the Fifth and Fourteenth Amendments. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).[2] "[T]he difficult problem [is] how to define 'too far,' that is how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Regional Planning Comm. v. Hamil-*

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[1] Pursuant to Rule 10.3 of the Rules of this Court, a copy of the notice of appeal was filed with the clerk of the District Court for the City and County of Denver on that same date.

[2] The Fifth Amendment's taking clause "applies against the States through the Fourteenth Amendment." *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2563 n.1 (1986). *See also Williamson County Regional Planning Comm. v. Hamilton Bank*, 105 S.Ct. 3108, 3111 n.1 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 623 n.1 (1981); *Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226, 236, 239, 241 (1897).

ton Bank, 105 S.Ct. 3108, 3124 (1985). Here, the state trial and appellate courts have given an exceedingly expansive answer to this "difficult problem." Eschewing any careful consideration of the "ad hoc, factual inquiries" identified by this Court (*Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)), the Colorado courts concluded that no state land-use regulation goes "too far" unless it deprives a landowner of all possible value. App. A at 13a-14a; App. B at 19a-20a. This reading of the constitutional limits on state regulatory authority is erroneous, and merits review by this Court. Moreover, because the lower courts' determination of the "taking" issue must be reversed, this case presents the Court with a long-sought opportunity to clarify whether the Fifth and Fourteenth Amendments require a state court to award just compensation when government regulation exceeds constitutional limits.

1. Factual Background

Appellant Harsh Investment Corporation, an Oregon corporation, owns a parcel of land in southeast Denver within a commercial district bounded by Interstate 25 on the west, Hampden Avenue on the north and Monaco Boulevard on the east. Tr. 337.[3] Landmark Land Company, Inc. ("Landmark") and Southmoor Park Shopping, Inc. ("Shopping") own adjoining parcels within the same district.[4] The parcels have for years been zoned for business and residential uses, including high-rise office buildings and condominiums. Tr. 156-157. Although each of the properties is currently developed in whole or in part with commercial uses, none yet takes full advantage

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[3] "Tr." refers to the transcript of proceedings before the state district court.

[4] Landmark is a New York corporation. Shopping is a Colorado corporation.

of the allowable zoning.[5] One half of the Landmark property is not yet developed at all. Tr. 33.

In late 1980, Landmark announced plans to construct a high-rise office building on its property. Tr. 338. Although the plans were consistent with the uses permitted by existing zoning regulations, the proposal angered certain homeowners residing near Landmark's property. Accordingly, the Southmoor Park East Homeowners Association ("SPEHA") organized in opposition to the development. SPEHA's essential complaint was that, despite Landmark's compliance with existing land-use regulations, the proposed construction would be incompatible with nearby residential areas. Tr. 3; Exh. H.[6]

SPEHA's attack on the development was double-barrelled. Initially, SPEHA submitted two applications to downzone commercial properties near its members' homes. Exh. S. At the same time, SPEHA submitted a proposed revision of Article IV of the Denver Municipal Code—the city's "mountain view" ordinance—to the Denver Planning Office.

A rezoning or downzoning application can be approved only after an adequate hearing and review (Code § 59-647(7)) in which it is found that the rezoning is supported by "changed or changing conditions" or "manifest error" in the original zoning. *Id.* at § 59-646. Any such proposal, moreover, must be shown to advance the health, safety or general welfare of the city. *Id.* The burden is on the proponent of the zoning change to prove that such change is necessary. *Id.* at § 59-648.

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[5] Appellant's property is occupied by a Howard Johnson's motel, restaurant and gas station. Shopping's property has a shopping center on the south side of Hampden Avenue, while Landmark's parcel is improved with a movie theater. Tr. 45, 161, 177-178.

[6] "Exh." refers to the exhibits presented before the state district court. The exhibits were admitted by stipulation of the parties. Tr. 4.

The cumulative impact of the above provisions on parties seeking to alter existing zoning is onerous. Indeed, SPEHA's first rezoning application was rejected by the Denver zoning administrator for failure to comply with the applicable ordinances. But it was ultimately unnecessary for SPEHA to shoulder the weight of a rezoning attempt. SPEHA's rezoning applications were withdrawn when the group's alternate line of attack bore fruit.

Article IV of the Municipal Code, entitled "Restrictions on Structures Within Areas Necessary to Preserve Mountain Views," is designed to protect uniquely scenic and panoramic mountain views by restricting building heights. Code § 10-56, App. F at 34a-35a. *See also* Tr. 88; Exh. CC. From the time Article IV was adopted in the mid-1960's until 1982, only five views—all from areas with significant regional and scenic importance—had been protected.[7] These views, moreover, had been protected upon the recommendation of the Denver Planning Office, following a careful analysis of the characteristics of the viewpoint, the quality of the view to be protected, the impact of view restrictions on surrounding properties, and the possibility of existing buildings or foliage obstructing the view. Tr. 244-246; 120-122.

The land on which Southmoor Park is located was developed as a park because drainage problems, steep grades and the existence of a culvert precluded other development. Tr. 159. Except for its designation by the Denver Parks Department as a sledding area, the park lacks any regional significance. Exh. JJ. While some limited views of the distant Rocky Mountains are available

[7] These included Cranmer (Sundial) Park (protected in 1968), Cheesman Park/Botanic Gardens (protected in 1968), Ruby Hill Park (protected in 1969), the State Capitol Building (protected in 1971), and City Park (protected in 1975). In 1983, mountain view ordinances were adopted for State Home Park (App. F at 38a-39a) and Washington Park (App. F at 40a-41a).

from certain points on the edge of the park,[8] those views will be almost totally obliterated in the near future by the growth of trees and other foliage.[9] Indeed, the park's only notable feature is its location: near the homes of SPEHA members. That location was pressed to full advantage when SPEHA proposed an amendment to Article IV of the municipal code establishing a view plane from the edge of the park.[10]

The ordinance drafted by SPEHA differed substantially from any previous mountain view regulation. Unlike any that came before it (or since), the proposal included two exceptions to the view plane it created. First, the SPEHA ordinance included a 42-foot exception for business structures, regardless of whether such structures would intrude into the view plane at that height. Tr. 79; App. F at 43a. Second, the ordinance permitted the owners of existing nonconforming structures, in the event of destruction, to reconstruct their buildings back to present heights, regardless of any impact on the mountain view. Exh. GG; App. F at 44a. The SPEHA proposal was submitted by the homeowners' local city councilman, Paul Hentzell, to the Denver Planning Office.

The Planning Office found that Southmoor Park failed to meet the established criteria it had applied to all previously protected areas, and recommended that the

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[8] Because of the steep topography of the park, mountain views are only possible from the park's outer perimeter. The trial judge noted that "the park line drops over very sharply into a hole," and that "as you go downward, why, you lose the view because it drops off so much." App. B at 23a.

[9] Evidence presented before the trial court showed that existing trees in the park would block the mountain view once they reached 30 feet in height. Tr. 86-94.

[10] Article IV creates view planes by designating fixed reference points and then specifying graduated height limitations which increase the further one moves from the reference points. *See, e.g.*, Code § 10-58(b); App. F at 35a-36a.

SPEHA ordinance be rejected. Tr. 122, 339; Exh. DD.[11] Based on the recommendation of the Planning Office and the evidence presented to it, the Denver Planning Board voted unanimously (with one member abstaining) to recommend to the Denver City Council that the SPEHA proposal be rejected. Exh. EE.

Despite the recommendations of the Planning Board and Planning Office, the City Council on July 19, 1982 yielded to political realities and voted in favor of the interests of several hundred local residents over those of a handful of out-of-state landowners. Tr. 339. As the trial judge noted from the bench, this was "one of those cases where these people [the landowners] don't have very many votes and the Southmoor Park East Homeowners Association has several hundred." App. B at 24a.

Immediately upon enactment of the ordinance, appellant lost all rights previously allowed by zoning to develop its property above 42 feet. Within a few days after the enactment of the ordinance, SPEHA withdrew its pending rezoning applications. Exh. U, V. SPEHA

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[11] Among other reasons, the Planning Office found that the mountain view from the park was minimal (Planning Office criteria require that Mt. Evans be visible at a proposed viewpoint from an 8500 foot elevation upward; at Southmoor Park the mountain is only visible from 9750 feet upward (Tr. 86-94; Exh. DD)), the topography of the park was inappropriate (Planning Office criteria require that a protected park be at least 25 acres in size; Southmoor Park contains only 18.5 acres (*id.*)), the "view" was or shortly would be totally obscured by foliage and permissible development (existing foliage in the park will violate the view plane when it reaches 30 feet in height (Exh. DD)), there would be substantial injury to the burdened commercial property (Planning Office criteria require that not more than 70 acres of business property be adversely affected by a new mountain view ordinance; the Southmoor Park ordinance substantially reduces the value of 390 acres of commercial property (Tr. 86-94; Exh. DD)), and the park had no regional or city-wide significance but was instead simply a neighborhood pocket park (Tr. 145, 137-139).

explained that a change in circumstances made it no longer necessary to pursue the rezoning. Exh. V.

2. Proceedings Below

Within 30 days of the adoption of the SPEHA ordinance, appellant, Landmark and Shopping challenged the validity of the city's action (Tr. 29), and SPEHA intervened as a defendant. Appellant alleged that the SPEHA ordinance constituted a *de facto* downzoning of its property, and that it was accordingly entitled to the procedural protections accompanying a downzoning. Tr. 16-17. Appellant also claimed that enactment of the ordinance despite its failure to meet the Planning Office's articulated criteria was arbitrary and capricious and in excess of the state's police power. *Id.* Finally, appellant asserted that the SPEHA ordinance was confiscatory of its property, in contravention of the Takings Clause of the Fifth and Fourteenth Amendments. *Id.*

The evidence on the first two issues was virtually undisputed. Appellant demonstrated that the SPEHA ordinance was primarily designed not to protect a mountain view, but to deal with issues (such as traffic and population density) traditionally controlled through zoning regulations. The evidence also established that Southmoor Park itself lacked all of the characteristics theretofore required of protected view planes. *See* note 11, *supra.* The trial court nevertheless held that "the City has a right to pass a separate mountain view ordinance without following the charter and ordinance requirements on zoning." App. B at 20a. It also concluded that mountain view ordinances, in general, are rationally related to a legitimate government purpose (*id.* at 21a) and that the SPEHA ordinance was not irrational because some mountain peaks could indeed be seen from certain locations on the edge of Southmoor Park, *id.* at 23a.

On the takings issue, appellant presented extensive evidence showing the actual economic impact of the

SPEHA ordinance on its property and the ordinance's interference with its investment-backed expectations. Prior to the enactment of the ordinance, appellant could have built two 25-story commercial towers on its property. Following the ordinance, development is limited to several two- or three-story structures. Tr. 177-178.[12] Expert calculations demonstrated that, without the SPEHA ordinance, the investment expectation from the appellant's property is $54,600,000. Tr. 180; Exh. UU. With the restrictions imposed by the ordinance, the investment expectation is reduced to $19,220,000. Tr. 182; Exh. UU. The difference, $35,380,000, constitutes an approximate 65% loss in the investment expectation value of the property. *Id.*[13]

Appellant's evidence also illuminated the character of the governmental action embodied by the SPEHA ordinance. The effect of the ordinance was to condemn a scenic easement on appellant's property, without conferring any significant reciprocal benefits on the property owner. As to that easement, moreover, the portion taken was 100%.

Although the trial court noted that the facts regarding the impact of the SPEHA ordinance were "undisputed" and that the economic effect of the measure was "substantial," it rejected appellant's assertion that the ordi-

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[12] Under present zoning regulations, appellant could have built in excess of 1,000,000 square feet of floor area on its property. After the SPEHA ordinance, it can build approximately 300,000 square feet, representing a reduction in floor area in excess of 66%. Tr. 177-178. The appellant's property is zoned for construction of two high-rise towers. After the SPEHA ordinance, the property is suitable only for a complex consisting of three three-story buildings. Exh. KK.

[13] An alternative calculation relating to the fair market value of the property in its current state of development showed that, without the SPEHA ordinance, the property is worth $15 million. With the ordinance, it is worth approximately $6 million. This $9 million loss represents a 60% diminution in value. Tr. 185.

nance violated the Fifth and Fourteenth Amendments because "there was not a complete taking of the . . . properties." App. B at 19a. In the trial court's view, so long as government land-use regulations leave property owners with a shred of value, they are immune from careful constitutional scrutiny. *Id.* at 19a-20a.

Appellant filed a timely appeal to the Colorado Supreme Court, which affirmed as to all three issues pressed in the trial court. On the federal constitutional issue, the court rejected the appellant's taking claim based on the "well-settled rule in Colorado" that an ordinance restricting the use of land is not unconstitutional unless it " 'precludes the use of [the] property for *any* reasonable purpose.' " App. A at 13a (*quoting Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237, 241 (Colo. 1974)) (emphasis in original).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision of the Colorado Supreme Court raises important and recurring issues regarding the scope of a state's authority to take valuable "strands" from a landowner's "bundle of rights" (*Keystone Bituminous Coal Association v. DeBenedicts*, No. 85-1092, slip op. at 7 (March 9, 1987)) without payment of compensation. Although the SPEHA mountain view ordinance substantially diminishes appellant's property value and dramatically interferes with its investment-backed expectations, the court below held the ordinance constitutional solely because it did not destroy every reasonable use of appellant's property. This single-factor analysis may be appropriate in the context of a facial Fifth Amendment challenge to government regulation,[14] but such an adum-

[14] " 'The test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . ." ' " *Keystone Bituminous Coal*, slip op. at 23 (*quoting Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 296 (1981)).

brated approach is patently erroneous where, as here, a litigant has challenged the constitutionality of land-use regulations as applied to discrete property. Indeed, the Colorado Supreme Court's decision disregards *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), in which this Court held that diminution in value and interference with investment-back expectations are significant factors in any as-applied takings analysis. *Penn Central* did not hold that the Constitution affords no relief unless the landowner is left with absolutely nothing of value, and the Colorado Supreme Court's holding to this effect clearly presents a substantial federal question.

The decision below also significantly expands the authority of government to pluck "strands" from a property owner's "bundle" at will (and without compensation) in pursuit of aesthetic values. This is a substantial issue which was surveyed, but not definitively mapped, by *Penn Central*. Plenary review of the lower court's decision is accordingly warranted.

I. THE SPEHA MOUNTAIN VIEW ORDINANCE TAKES APPELLANT'S PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. The Colorado Supreme Court Erroneously Analyzed The "Takings" Issue Under A Single Factor, Total Loss Of Value Test

This Court has frequently emphasized that the term "property" as used in the Takings Clause includes the entire "group of rights" inhering in the citizen's ownership. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). The term is not used in the

> vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead, it] denote[s] the group of rights inhering in the citizen's relation to

> the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

Id. at 377-378.

Beyond dispute, the SPEHA mountain view ordinance appropriates a valuable property right of the appellant. *See Griggs v. County of Allegheny*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946). By totally prohibiting any construction above 42 feet, the City of Denver has acquired the "equivalent of a fee interest" in appellant's airspace—an action which absolutely destroys "[t]he owner's right to possess and exploit [that interest in] the land." *Causby*, 328 U.S. at 262. *Cf. Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). The SPEHA ordinance, in effect, burdens appellant's property with a scenic easement, with the benefits of that easement flowing primarily to SPEHA members. The property interest acquired by the city, moreover, has demonstrable value. *See* Cantrell, *Scenic Easements: Evaluation Considerations*, 49 Real Estate Appraiser and Analyst 61 (1983); Sutte, *Scenic Easements*, 34 Appraisal Journal 531 (1966). And, as to that easement, the taking is complete.

This Court has recognized that there is no established formula for determining whether the regulatory acquisition of such a property interest constitutes a taking for which just compensation is required; rather, analysis must center on the circumstances of each case. *See United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). *See also FCC v. Florida Power*, No. 85-1660, slip op. at 4-6 (February 25, 1987); *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986); *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Kaiser Aetna*, 444 U.S. at 175. The general guidelines for that analysis, however, are settled. Courts must pay particular attention to the economic impact of a regulation on com-

plaining property owners, the regulation's interference with distinct, investment-backed expectations, and the character or nature of the government action. *Penn Central*, 438 U.S. at 124; *Keystone Bituminous Coal*, slip op. at 16, 18. Only through a close evaluation of these and other pertinent factors can one determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 124.

The Colorado Supreme Court's analysis eliminates all of the above factors from the takings determination. That court recognized—and then dismissed as inconsequential—the fact that the SPEHA ordinance "substantially diminished the value of appellant['s] property." App. A at 8a; App. B at 19a. Moreover, the court refused to even consider appellant's argument that the ordinance substantially interfered with its distinct investment-backed expectations.[15] Instead, the court substituted a single, oversimplistic query: whether the property owner had anything left after the state took what it wanted.[16] That test was not met because Denver had not "take[n] all value" from appellant's property. App. A at 8a.

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[15] While appellant specifically argued and presented evidence on this factor (*see Brief for Appellant Harsh Investment Corp., Landmark Land Co. v. City and County of Denver*, No. 84SA410 (Colo. S.Ct.)), the state supreme court did not even consider it, holding instead that its "no value" analysis was dispositive. App. A at 13a-14a.

[16] The court's opinion makes clear that, in Colorado, no other factor is even relevant to the takings analysis: "It is a well-settled rule in Colorado that in order to establish that an ordinance . . . is unconstitutional, it must be shown that the 'ordinance precludes the use of [the] property for *any* reasonable purpose.' " App. A at 13a (*quoting Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237, 241 (Colo. 1974) (emphasis in original).

The Colorado court's "takings" test is quickly applied, but its impact is unduly (and unconstitutionally) draconian. In effect, if any value remains in property following a regulatory action, the regulation itself is not a taking—regardless of diminution in value, effect on investment-backed expectations, or the nature of the governmental interests involved. This narrow inquiry is flatly inconsistent with this Court's prior cases, and is forbidden by the Takings Clause.[17] Property "values are enjoyed under an implied limitation and must yield to the police power," but that "implied limitation must have its limits, or the contract and due process clauses are gone." *Pennsylvania Coal*, 260 U.S. at 413. The Colorado Supreme Court's "no value" analysis stretches state police power beyond all reasonable latitude,[18] and distorts fundamental principles of Anglo-American property law. The test, for that reason, is inadequate to protect the constitutional guaranty that property not be taken without compensation.[19]

This is not to say that the Constitution protects against any diminution in value. But *Penn Central* teaches, we submit, that a rigid, *per se* approach is inappropriate at either end of the spectrum. In any event,

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[17] The "no value" test becomes even more onerous when coupled with the "beyond a reasonable doubt" standard of proof Colorado applies to constitutional claims. Under this standard, to prove an unconstitutional taking, a litigant must not only show that government action takes all property value—that showing must be made beyond all reasonable doubt. App. A at 9a.

[18] *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Kaiser Aetna v. United States, supra.*

[19] Certainly the Fifth and Fourteenth Amendments would protect against Denver's taking a 100-foot right-of-way easement across a parcel of property 1000 feet wide, even though 90% of the property was unaffected. It is difficult to distinguish that hypothetical from what happened here. In both cases, an easement was taken.

there can be little doubt about the substantiality of the question.[20]

B. The Impact Of The Ordinance, Appellant's Lost Expectations And The Nature Of The Governmental Action Establish The Regulation As A Taking

Reasoned application of the factors first noted by this Court in *Penn Central* demonstrates that the SPEHA ordinance constitutes a taking of appellant's property. The diminution in the value of appellant's property severely impacted appellant's investment-backed expectations. Those expectations were grounded in longstanding zoning regulations that, instead of being amended by a process in which appellant could meaningfully participate, were short-circuited by a political juggernaut which effectively left appellant without representation. Moreover, the nature of the governmental action, involving

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[20] Colorado is not the only state judicial system to ignore the limitation on police power embodied in the Takings Clause. Six other states also apparently apply a rigid "no value" test. *See, e.g., Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), *appeal dismissed*, 105 S. Ct. 3549 (1985) (to constitute a taking, state action must deprive owner of all beneficial enjoyment of property); *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892 (1983), *appeal dismissed*, 469 U.S. 802 (1984) (there is a taking only if state restriction essentially deprives the owner of all beneficial uses of his property); *Ramer v. City of Hoover*, 437 So.2d 455 (Ala. 1983) (there is no taking unless the interference is so substantial as to render the property worthless or useless); *Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1979) (in order to be classified as a taking, state action must render property unsuitable for any reasonable income, totally destroying its economic value); *Metzger v. Town of Brentwood*, 117 N.H. 497, 374 A.2d 954 (1977) (taking is a restriction which deprives owner of any reasonable use of his land); *Zygmont v. Planning and Zoning Commission*, 152 Conn. 550, 210 A.2d 172 (1965) (to constitute a taking, zoning regulations must do more than devalue property—they must also deprive owner of any reasonable property use). Accordingly, review is appropriate here not only to correct the error of the Colorado courts, but also to provide needed guidance for other states.

the promotion of aesthetics rather than abatement of a public nuisance, suggests that the Court need not be "hesitan[t] to find a taking." *Keystone Bituminous Coal*, slip op. at 18. Review by this Court is essential to clarify that the *Penn Central* factors do not release land-use regulations from the strictures of the Fifth and Fourteenth Amendments. *Cf. Pennsylvania Coal*, 260 U.S. at 413.

1. The diminution in value of appellant's property here is considerably more severe than the loss involved in *Penn Central*. In that case, the Court held that the designation of a railroad terminal as a "historical landmark" did not constitute a taking even though regulations accompanying the designation prohibited any future construction which did not "harmonize in scale, material, and character" with the landmark. 438 U.S. at 137. Critical to the Court's analysis, however, was the fact that the property owners had proven no actual diminution in property value. First, the record did not show any specific economic loss, since it was not clear that *all* construction above the terminal was prohibited.[21] Second, state law provided a transferable development-rights program which permitted the appellant to transfer lost development rights above the terminal to other properties, "undoubtedly mitigat[ing] whatever financial burdens the [landmark preservation] law has imposed on appellant[]." 438 U.S. at 137. By contrast, this case involves a dramatic devaluation of the appellant's property, amounting to at least 60%.[22] Moreover, because no trans-

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[21] New construction that would "harmonize in scale, material, and character" with the existing structure, for example, was not precluded. 438 U.S. at 137.

[22] Where appellant could have constructed two 25-story commercial towers with an excess of 1,000,000 square feet of floor space, it may now build several three-story structures containing only 300,000 square feet of floor space. Tr. 177-178; Exh. KK. The undisputed evidence shows that these limitations diminish the value of appellant's property by at least 60 percent. *See supra* notes 12-13 and accompanying text.

ferable development rights program exists in this case, there is nothing to mitigate the financial burdens imposed by the SPEHA ordinance.

2. This case presents an excellent opportunity to explore the contours of the second *Penn Central* factor: interference with investment-backed expectations. Significant confusion has arisen concerning this factor. This may be because its definition requires a reconciliation of "what are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other." J. Ely, *Democracy and Distrust*, 86-87 (1980). As a result, the creation of a distinct investment-backed expectation apparently requires something more than the mere knowledge that a certain type of development or property use is allowed by state law. This is because "government regulation—by definition—involves the adjustment of rights for the public good" and often "this adjustment curtails some potential for the use or economic exploitation of private property." *Andrus*, 444 U.S. at 65. Exactly what is required to create such an expectation, however, has never been specifically addressed by this Court. Review here will give the Court that opportunity.[23]

Appellant possessed the distinct, investment-backed expectation that it could fully develop its property consistent with applicable zoning regulations. Although appellant was certainly aware that the zoning regulations could change, appellant also had the right to rely on the

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[23] The closest this Court has come to defining investment-backed expectations was in *Kaiser Aetna v. United States, supra.* In that case, the Court held that consent of United States officials could "lead to the fruition of a number of expectancies embodied in the concept of 'property.'" 444 U.S. at 179. Beyond this and other similar statements, however, the Court has never elucidated the "investment-backed expectation" concept. *See, e.g. Ruckelshaus v. Monsanto Co., supra.*

established procedures applicable to such changes.[24] Thus, appellant could expect that its rights to develop its property under controlling zoning regulations would be altered only following an adequate hearing and review, during which the parties proposing any change would have the burden of proving that manifest error in the original zoning or changed conditions warranted the alteration. Code § 59-646, 647. This expectancy is substantial; a landowner is thereby assured that its land-use rights cannot be whisked away by passion, caprice or disregard for established procedural safeguards.[25]

Striking the balance between individual property rights and state power to act in the public good will always be problematic. But at least one thing is clear: while one cannot reasonably expect that the state will never alter

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[24] Under Colorado law, "when the matter is permitted by right in the zone created and either through an environmental concern or a change of circumstances the use is incompatible with prior usage, the proper procedure is to amend the zoning resolution." *Western Paving Construction Co. v. Board of County Commissioners of Boulder*, 506 P.2d 1230, 1232 (Colo. 1973) (en banc). *See also Vick v. Board of County Commissioners of the County of Larimer*, 689 P.2d 699, 702 (Colo. Ct. App. 1984) (where the zoning body has zoned property to permit a certain type of development but thereafter, for environmental reasons, "decides that the property is not suitable for such development, then a zoning resolution containing adequate standards should be adopted").

[25] The record here makes clear that the mountain view ordinance was a political short-cut to a land-use limitation that could not be readily obtained by SPEHA through the zoning process. The SPEHA ordinance failed all established criteria for the protection of a mountain view (*see supra* note 11 and accompanying text) and was recommended against by the Denver Planning Office and Planning Board (*id.*). The ordinance itself differs from all other mountain view provisions in that it permits a 42-foot building regardless of impact on the view plane, as well as permitting reconstruction of existing non-conforming commercial towers. App. F at 43a-44a. The apparent goal of SPEHA in drafting the ordinance was to downzone *de facto* commercial property—not protect a panoramic mountain view.

its property regulation, one can expect that no sudden changes in that regulation will occur by simple political fiat. Under the Takings Clause of the Fifth Amendment:

> what one primarily has a right to is the maintenance of the conditions of one's fair and effective participation in the constituted order, as an individual no less entitled than others to the respect and concern of the community, and also no more entitled than [others] to any particular outcomes save those that [bear on] the conditions of continued effective participation. Loss—even great loss—of economic value of one's [holdings may] not as such violate those conditions. What does, perhaps, violate them is exposure to sudden changes in the major elements and crucial determinants of one's established position in the world, as one has come . . . to understand that position.

F. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1112-1113 (1981) (quoting F. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 Harv. Civ. Rts.—Civ. Lib. L. Rev. 296, 306 (1980)) (brackets in original). Thus, one reasonably expects state regulation of private property; but one also expects to participate, through the normal process, in the development of that regulation. If such is not the case, the state action may indeed interfere with the distinct investment-backed expectations created by the regulatory scheme itself.

Appellant lost valuable property rights protected by applicable zoning regulations because it is an out-of-state developer with plans opposed by a politically powerful group of local homeowners. The controversy between these parties was not resolved on its merits in a zoning proceeding where both sides would have had the opportunity to present their viewpoints and a public body would have had the duty of balancing all relevant considerations in the course of resolving the matter under the over-arching umbrella of the general welfare. Rather,

as the trial judge wrly noted, this is "one of those cases where these people [the landowners] don't have very many votes and the Southmoor Park East Homeowners Association has several hundred." App. B at 24a. Plenary review is warranted to clarify that the concepts of "justice and fairness" underlying the Takings Clause (*Penn Central*, 438 U.S. at 124) indeed protect investment-backed expectations created by government—here, zoning regulations—from untrammelled, standardless abrogation. *Cf. Kaiser Aetna*, 444 U.S. at 179-180.

3. Substantial economic harm and lost investment-backed expectations are often not decisive of a takings claim. "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." *Keystone Bituminous Coal*, slip op. at 16. Here, the City of Denver has appropriated at least 60% of the value of appellant's property and dashed its investment-backed zoning expectations in furtherance of a purely aesthetic goal—preservation of a mountain view. Although in *Penn Central* the Court upheld a city ordinance promoting aesthetic values against a takings challenge, it did so in a context where no specific economic injury or lost investment-backed expectations had been shown. 438 U.S. at 136-137. This case presents the Court with a needed opportunity to clarify whether, in all circumstances and at all costs, the burden of preserving aesthetic values should be "borne by corporations" rather than "individual taxpayers." *Penn Central*, 438 U.S. at 152-153 (Rehnquist, J., dissenting).

"[N]ot every destruction or injury to property by governmental action" is a "'taking' in the constitutional sense." *Armstrong v. United States*, 364 U.S. 40, 48 (1960). Where the government need to regulate is "substantial," the Court has concluded that regulatory action "in many instances has not required compensation." *Keystone Bituminous Coal*, slip op. at 20. Thus, the Court

has recognized two relatively well-defined circumstances where governmental destruction of property interests does not violate the Takings Clause. First, a state may prohibit property use without effecting a taking if the forbidden use is dangerous to the safety, health, or welfare of others. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Second, a taking does not occur if the state prohibition applies over a broad cross section of society and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal*, 260 U.S. at 415.[26] Neither consideration justifies the uncompensated appropriation of appellant's property interests in this case.

The record is clear that the construction of two 25-story office buildings on appellant's property would be in full compliance with zoning, development, and other health and safety requirements. Thus, the SPEHA ordinance does not prohibit a nuisance. Instead, the City of Denver—at the behest of SPEHA—has acted to preserve what it believes to be scenic beauty. And, while enhancement of the "desirable aesthetic features of a city" may be a permissible goal (*Penn Central*, 438 U.S. at 129), not every means to that end comports with the dictates of the Takings Clause. Denver, because of its admiration for a mountain view, has decided that appellant must preserve that view for the benefit of local residents. But, unlike specific land-use regulations, this prohibition does not merely interdict appellant from using its property in a narrow set of noxious ways. Rather, while appellant may continue to use a portion of its land, the city has appropriated everything above 42 feet for public use. This is not, in short, the type of governmental action

[26] The Court has recently suggested that there is a close relationship between these two factors. When a state "restrains uses of property that are tantamount to public nuisances," such action is "consistent with the notion of 'reciprocity of advantage' . . . referred to in *Pennsylvania Coal*." *Keystone Bituminous Coal*, slip op. at 18.

where the Court is properly "hesitan[t] to find a taking." *Keystone Bituminous Coal*, slip op. at 18. It is, instead, a clear example of property being taken by restricting "the owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

Nor does the regulation apply over a broad cross section of society, thereby securing an average reciprocity of advantage for appellant. The Denver ordinance is not a zoning regulation.[27] It is legislation aimed specifically at appellant. It was passed by the city council as a direct result of public pressure. The ordinance, moreover, limits only future construction in the area. It allows existing structures in violation of the 42-foot requirement to remain, and even provides that these structures may be rebuilt to their present height if they are damaged or destroyed. App. F at 43a-44a. This frees existing high-rise buildings from the ordinance's restrictions, allowing those property owners—some of whom strongly advocated the ordinance—to gain all its benefits (principally, immunity from future competition) without giving up anything in return.[28] Thus, in reality, the ordinance adversely affects only appellant, Landmark and Shopping. Unlike zoning or other reciprocal regulations, where the burden of the restrictions is shared fairly evenly, appellant and two other landowners bear the entire brunt of the ordinance. Although the Takings Clause does not bar government from imposing "burdens . . . in excess of the benefits received" (*Keystone Bituminous*

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[27] Indeed, SPEHA first attempted and failed to change the applicable zoning laws. App. B at 17a-18a.

[28] The competitive burden placed upon appellant by the SPEHA ordinance is especially heavy. Directly across the street from appellant's Howard Johnson's motel—and plainly within the area regulated by the SPEHA ordinance—is a high-rise Marriott Hotel. Tr. 178. As a result, while appellant, in the name of scenic beauty, cannot develop its property to compete with the high-rise, Marriott can maintain perpetually its facility despite aesthetic impact.

Coal, slip op. at 19 n.20), this is exactly the type of extreme burden imposed on a few individuals in the name of the public good that the Clause does prohibit. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the Fifth Amendment prevents the public "from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him").[29]

II. THIS CASE WILL PERMIT THE COURT TO CLARIFY WHETHER THE CONSTITUTION MANDATES COMPENSATION IF LAND-USE REGULATIONS CONSTITUTE A TAKING

This case raises a vital issue the Court has unsuccessfully attempted to address five times in the past seven years: whether the Fifth and Fourteenth Amendments require compensation for a regulatory taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199 (argued January 14, 1987); *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, *supra*; *San*

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[29] *See also Armstrong*, 364 U.S. at 49 (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Nashville, C. & St. L.R.R. v. Walters*, 294 U.S. 405, 429-430 (1935) ("While money raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them"). *Cf. Keystone Bituminous Coal*, slip op. at 19 n.20 ("Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received").

Diego Gas & Electric Co. v. City of San Diego, supra; Agins v. City of Tiburon, 447 U.S. 255 (1980). In each of these cases (except for *First English Evangelical* which is still awaiting decision), the compensation issue has eluded the Court because of doubt "regarding the antecedent question whether . . . property has been taken." *MacDonald, Sommer & Frates*, 106 S.Ct. at 2568-2569. Because there can be no doubt that the SPEHA ordinance, properly analyzed, results in a taking, this case presents the Court with the opportunity to answer the Fifth and Fourteenth Amendment compensation question.[30]

The question whether the Takings Clause requires compensation is, without doubt, an important one. The Court's failure to clarify the issue, moreover, has resulted in considerable disarray among the states concerning the appropriate remedy for land-use regulations that constitute a taking.[31] The present case is an appropriate vehicle for dispelling this confusion.

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[30] At this writing, the decision in *First English Evangelical* has not been announced. It has been argued, however, that the compensation issue is not properly presented there. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199, Brief of Appellee at 14-29; *id.*, Brief For The United States As Amicus Curiae Supporting Appellee at 7-9. Should the Court reach and answer the compensation question in *First English Evangelical*, it would be unnecessary for the Court to address the second question presented by this Jurisdictional Statement.

[31] For example, compensation is apparently available in New Hampshire, North Dakota, and Rhode Island, but not in California, Connecticut, Florida or New York. *Compare Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981); *Sheerr v. Township of Evesham*, 184 N.J. Super. 11, 445 A.2d 46 (1982); *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983); and *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983) *with Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); *Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213 (Fla. 1984); *DeMello v. Town of Plainville*, 170 Conn. 695, 368 A.2d 71 (1976); *New York Tel. Co. v. Town of North Hempstead*, 41 N.Y.2d 691, 363 N.E.2d 694, 395 N.Y.S.2d 143 (1977).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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